

**A PRIMER:**

**WHAT STATE DEFENDERS  
NEED TO KNOW ABOUT  
FEDERAL CRIMINAL LAW**

Wendy Holton  
CJA Supervising Attorney  
50 West 14th Street, Suite 1  
Helena, Montana 59601  
406-447-5753  
[wendy\\_holton@fd.org](mailto:wendy_holton@fd.org)

## A PRIMER – WHAT STATE DEFENDERS NEED TO KNOW ABOUT FEDERAL CRIMINAL LAW

You cannot practice state criminal law in a vacuum – Regardless of whether you ever set foot in federal courtroom, or your intent is to avoid federal court like the plague if you practice state criminal law, you must know something about federal law.

Most importantly know what questions to ask and, if your client has an attorney in federal court, work together.

How you handle the state court case can impact your client in numerous ways in the federal system.

- It can result in the filing of federal charges and, in essence, handing your client over on a silver platter.
- It can result in a prohibition on your client possessing a weapon and the filing of federal charges if they do. 18 U.S.C. 922(g) (attached)
- If your client is not a citizen, it could result in deportation.
- Regardless of whether there is an immediate impact - a sentence your client receives in state court will affect your client's criminal history and, thus, his sentence if he is ever convicted of an offense in federal court.
- You must have some understanding of the federal sentencing guidelines.

## Jurisdiction

- Article II, § 25 of Montana's precludes subsequent prosecutions in Montana for the same offense previously tried in any jurisdiction.
- However, a federal prosecution following a state prosecution for the same offense is not precluded by the Double Jeopardy Clause of the Fifth Amendment to the United States' Constitution.
- The federal system can make an offense a federal crime so long as there is a federal nexus – i.e., interstate commerce (guns, computers, drugs etc.) – or if the offense occurs on federal property or on an Indian reservation.
- Since the 1970's, Congress has vastly increased the federal government's jurisdiction over crime
- What used to be considered street crime that was traditionally prosecuted in State Court is increasingly coming under the federal umbrella.
- Thus, there are many areas where state and federal criminal law now overlap.
  - Drug possession, distribution, and manufacture
  - Firearms possession and use
  - Burglary or Robbery where firearms or drugs taken (Commerce Clause)
  - Child Pornography
  - Fish and Game Violations

- Environmental Crimes
  - Fraud
  - Gambling Violations
  - Securities Violations
- 
- Any time you are dealing with a crime falling into any of these categories you must determine whether the feds have an interest in prosecuting your client – and you must take action to minimize the damage.
  - Don't ever assume that the feds won't find out about your client.
  - Federal and state law enforcement work together – often on the same task forces.
  - Federal prosecutors, like state prosecutors specialize and they are in touch with each other.
  - They read the papers.
  - It is no secret that federal prosecutors, are driven by numbers.
  - They justify their existence by numbers of successful prosecutions and the easiest way to get your numbers up is to shoot ducks in a barrel.
  - That is why there are a disproportionate number of federal firearms prosecutions in Montana – Every time a state probation search turns up a gun the feds have another statistic. No muss, no fuss.
  - The other thing federal prosecutors rely on is people ratting each other out. The system is set up to reinforce this.

- As you probably know, many offenses in the federal system have mandatory minimum penalties.
- The most notorious of these are mandatory minimums in drug cases. For example: 50 grams of methamphetamine buys you a mandatory 5; 500 grams of methamphetamine, a mandatory 10.
- Although the Safety Valve mitigates this in some instances<sup>1</sup> in many cases the judge has absolutely no discretion to sentence below these mandatory sentences – unless the government makes a motion based upon a defendant’s “substantial assistance.”
  - That is -- he or she has provided information that has led to another’s conviction.

---

<sup>1</sup> Title 18 U.S.C. § 3553(f), commonly called the “safety valve,” allows a district court to sentence a criminal defendant below the mandatory-minimum sentence for certain drug offenses if the defendant meets the criteria in § 3553(f)(1) through (f)(5):

- (1) the defendant does not have--
  - (A) more than 4 criminal history points, excluding any criminal history points resulting from a 1-point offense, as determined under the sentencing guidelines;
  - (B) a prior 3-point offense, as determined under the sentencing guidelines; and
  - (C) a prior 2-point violent offense, as determined under the sentencing guidelines;
- (2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
- (3) the offense did not result in death or serious bodily injury to any person;
- (4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and
- (5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

See, *United States v. Lopez*, 998 F.3d 431 (9<sup>th</sup> Cir. 2021): Section 3553(f)(1)'s "and" is conjunctive. Specifically:

“[A] defendant must meet the criteria in subsections (A) (more than four criminal-history points), (B) (a prior three-point offense), AND(C) (a prior two-point violent offense) to be barred from safety-valve relief by § 3553(f)(1). This means one of (A), (B), or (C) is not enough. A defendant must have all three before § 3553(f)(1) bars him or her from safety-valve relief.”

- Once a person has cooperated and the prosecution has made a specific motion under 18 U.S.C. 3553(e) then the judge has discretion in sentencing.
- So, as you can see, there is an incredible incentive to cooperate or to tell on everyone he or she knows.
- Any time you are dealing with a drug charge there is a good chance that your client's name will come up in as part of a federal conspiracy case.
- If there is a gun involved, it is almost a given.
- The other offense that will almost always result in federal charges is anything remotely dealing with child pornography.
- Any time a computer is used, the feds have their jurisdictional "hook." In some cases, all it takes is a camera or film that crossed state lines before being sold to your client.
- If your client pleads or is found guilty of any type of a production of pornography charge § 45-5-625 MCA, he will almost automatically be subjected to a 15-year mandatory minimum in federal court. 18 U.S.C. § 2251.

## **What to Do If You Think the Feds Are, or Might Become, Interested in Your Client.**

- If federal agents are involved in the investigation, you can be sure that the feds are interested.
- If there is a question, especially in a drug, gun, or child pornography case, ask the state prosecutor if he or she has been in contact with the feds regarding this case.
- Especially in a drug case, ask you client about what he or she knows about the extent of the enterprise.
- With a little luck, your client didn't spill his guts when he was arrested, and you can negotiate the terms of cooperation and debriefing.
- If not you're not in as good of a position, but you can still salvage something.
  - Sometimes, especially if you are the first one in, it is possible to get the feds to agree, in writing, not to prosecute your client federally.
  - Note: Neither law enforcement officers, (federal or state) or the state prosecutor can bind the federal prosecutor.
  - If you cannot get an agreement not to prosecute, and there is danger of a federal prosecution, there are other agreements you must get from the feds before debriefing or acting as a confidential informant.

- Get a written letter from the federal prosecutor granting your client use immunity (transactional immunity is almost impossible to get) and providing, pursuant to U.S.S.G. 1B1.8 that any incriminating information provided by your client won't be used against your client in sentencing.
- If a case is going to go federal it is generally possible to have the state dismiss the charges as federal penalties are almost always far more onerous than state.
- The bottom line here is – DON'T IGNORE THE POTENTIAL FEDERAL PROSECUTION.
- If you don't have a deal in place and your client cooperates – or pleads guilty he is fair game for the feds.

### **Potential Federal Consequences of a State Convictions**

- A state conviction can have numerous federal consequences for your client at least until his rights have been restored under the State constitution.
- Article II, § 28 provides: “Full rights are restored by termination of state supervision for any offense against the state.”
- Until your client's rights are restored his rights will be limited in at least the following respects:
  - He will be precluded from possessing a firearm and will be subject to federal prosecution if he does. (18 U.S.C. 922 (g), *United States v. Castleman*, 134 S.Ct. 1405 (2014) attached)

- ✓ Note that, in addition to felonies, a person can be precluded from possessing a firearm if he is convicted of “a misdemeanor crime of domestic violence”
  - ✓ Do your best to plead to disorderly conduct, etc. or get a deferred imposition of sentence in any domestic violence case.
  - ✓ Note that even a restraining order can render your client a “prohibited person.” 18 U.S.C.922(g)(8). Try to resolve these without a hearing. (See draft Stipulation, attached.)
- If he is serving a sentence in a penal institution, he will not be able to vote.
  - He will be precluded from serving on a federal jury.
  - He may be precluded from receiving food stamps or student loans.
- Regardless of whether his rights are restored:
- He will be precluded from enlisting in the military.
  - He may be precluded from obtaining or retaining some professional licenses or to engage in some professions such as banking and securities.
  - If there is a lifetime requirement that he register as a sex offender, he will be ineligible for federal assisted housing.

- If your client is not a citizen a felony conviction may result in deportation.

## **How What You Do in State Court Affects Future Federal Sentencing**

- Timing can be everything.
- Regardless of any of the other concerns, if your client receives a sentence for a criminal offense in state court and is subsequently convicted of a federal offense the state sentence will affect his criminal history calculation and, thus, his federal sentence.
- Federal sentencing guidelines
  - Offense Level/ Criminal history score. (U.S. Sentencing Guidelines, Chapter 4, attached)
  - Sentencing Grid (attached)
- Criminal History Calculations
  - U.S.S.G. § 4A1.1 sets out the number of points given for lengths of prior sentences:
    - (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.
    - (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

- U.S.S.G. § 4A1.2 (b) defines the term sentence of imprisonment as: “A sentence of incarceration and refers to the maximum sentence imposed.
- If part of a sentence was suspended, “sentence of imprisonment” refers only to the portion that was not suspended.
- If a person has been "Convicted of an offense," whether by guilty plea, trial, or plea of nolo contendere, but not yet sentenced, he or she will get an extra criminal history point.
- Juvenile sentences can count if they are recent enough or if the client was convicted as an adult. § 4A1.2 (2)
- Diversion from the judicial process without a finding of guilt (e.g., deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of nolo contendere, in a judicial proceeding (deferred prosecution) is counted as a sentence even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

- Clearly, this is not all encompassing.
- Sometimes all that you can do is the best you can do. But hopefully, this will help you do the best you can do.